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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 698

RANDOLPH LABORATORIES, INC.,
Petitioner,

vs.

SPECIALTIES DEVELOPMENT CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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SPECIALTIES DEVELOPMENT CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE MATTERS INVOLVED.

Respondent's Unclean Hands Should Bar It From a Court of Equity.

Specialties Development Corporation is the owner of four patents in the carbon dioxide fire extinguisher field, as follows:

Minor Patent No. 1,760,274
Towart Reissue Patent No. 22,045
Grant Design Patent 121,011
Mapes Reissue Patent No. 18,839

under which it had built up a business of exacting royalties, illegal price restrictions and other illegal restrictive

covenants under the guise of patent ownership. Its abuses not only violated private rights but even affected the public, so that the Federal Trade Commission in two instances issued cease and desist orders, namely:

30 Federal Trade Commission Decision 757, March 20, 1940

36 Federal Trade Commission Decision 431, March 29, 1943

Suits under one or more of the above mentioned patents have been brought in six instances, but the owners thereof never allowed the patents to be legally adjudicated on the merits. As a result of this illegal course of action, Specialties dominated the field and was able to claim "the entire industry was licensed under it (Minor) during its life."

After repeated threats to sue and put petitioner out of business, petitioner filed a declaratory judgment suit for adjudication of the Minor patent, in the United States District Court for the District of New Jersey, whereupon Specialties counterclaimed under the Minor, Towart, Mapes and Grant patents.

On March 28, 1949, the District Court found the Minor, Towart and Grant patents invalid, and claims 6, 8, 9 and 16 of the Mapes reissue patent 18,839 valid and infringed, and ordered an accounting with respect to the Mapes reissue patent.

On December 21, 1949 the Court of Appeals for the Third Circuit affirmed, holding the Minor, Towart and Grant patents invalid, sustaining the four claims of the Mapes patent but modifying the decree of infringement. 178 F. (2) 477.

The Mapes Reissue Patent Is Invalid.

Both the Mapes patent in suit, originally issued April 12, 1932, and the Campbell patent issued twenty years earlier, relied upon to invalidate the Mapes patent, relate to recoil prevention safety caps used in connection with portable high pressure gas cylinders. The earlier Campbell patent so clearly shows the anti-recoil feature, that the patentee was compelled to admit that the placing of openings opposite each other to prevent recoil was old and that the Campbell patent provided such a cap. (R. 9)

When it became apparent that the Mapes patent could not be successfully asserted against any of petitioner's products on the ground that its safety cap acted as a coupling, because petitioner's anti-recoil device never served as a coupling, the patent was attempted to be sustained on the theory that the anti-recoil device could be mounted within the housing and therefore need not be removed, yet the patentee was compelled to admit on the stand that years before the patentee had started work, the Fire-Freeze Company (later absorbed by respondent) had put out a fire extinguisher embodying a non-removable safety cap recoil device.

Thus the prior Campbell patent and the earlier Fire Freeze non-removable anti-recoil device clearly showed everything that the late comer Mapes attempted to claim.

The Mapes Patent Is Not Infringed.

Only four claims of the Mapes patent were involved at the trial. Claim 6 is specifically limited to a safety cap provided with a coupling. Respondent has never provided its safety cap with a coupling. Claims 8 and 9 are limited to a safety cap comprising a body member externally threaded adjacent each end. Petitioner's prod-

uct is not so externally threaded. Claim 16 is limited to a high pressure gas container. Petitioner's products are not gas containers but contain liquid carbon dioxide, and all of its models are provided with a siphon tube which would be required and usable only in connection with liquid containers.

In view of the fact that the earlier Campbell patent showed a recoil preventing safety device, the use of language in claim 16 "arranged to have a conducting means attached thereover to permit the delivery of gas to the conducting means from the container without the necessity of removing the recoil preventing device" is functional inasmuch as it contains no positive recitation or limitation to the structure attempted to be patented.

Jurisdiction of This Court To Review the Decree in Question.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, chapter 229, 28 U.S.C.A., section 347 (a). The decree which the petitioner seeks to have reviewed was entered by the Court of Appeals for the Third Circuit on December 21, 1949.

The Questions Presented.

1. Whether respondent is in Court with unclean hands because of its improper use of patents in its program of price fixing, restrictive covenants and monopoly.

2. Whether the Mapes Reissue patent is valid and infringed in view of the admittedly old features of anti-recoil devices and locating them within the housing without the necessity of removal thereof upon discharging or recharging the extinguisher, and the limited elements specified in the claims which are not found in petitioner's structures.

Reasons for Allowance of the Writ.

1. The confusion and chaos resulting from different interpretations of the law should be ended by a definite holding by this Court that use of patents beyond the scope of the grant by which an illegal monopoly is established, vitiates whatever was granted in the patents, and designates the party guilty of such practices as condemned with unclean hands and therefore barred from a court of equity.

Witnesses declared before the House Committee on the Judiciary Sub-committee for Study of Monopoly and Power:

> "For the anti-trust laws of the United States have left business in a state of complete uncertainty. • • • During recent years the Supreme Court has progressively changed the rule as to patents in connection with the anti-trust laws. In the *General Electric* case (*U. S.* v. *General Electric Co.*, 272 U. S. 476) it was held that a patentee could fix the price at which his licensee would sell the licensed invention. This has been a rule of property since 1926. In the *Lime Material* (*United States* v. *Lime Material Co.*, 333 U. S. 287) and *Gypsum* (*United States* v. *U. S. Gypsum Co.*, 333 U. S. 364) cases this rule of property narrowly escaped being overruled, • • •."

2. The opinion and decree of the Court below constitutes a decision upon important questions of federal law in confilict with applicable decisions of this Court and in confiict with the opinions of the Courts of Appeals in other Circuits, as follows:

A. The Mapes patent is for a mere rearranging of the location of an old element, performing an old function, and falls far below that ingenuity which characterizes invention, and amounts to no more than merely the product of one skilled in the art to accomplish the result in an obvious manner. As such the decision of the Court of

Appeals is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Sales Associates, Inc.* v. *National Mineral Co.*, 172 F. (2d) 608, and with the decision of the First Circuit in *Loew's Drive-In Theatres, Inc. v. Park-In Theatres, Inc.*, 174 F. (2d) 547.

B. The Court of Appeals in ignoring the limitations with respect to the use of the anti-recoil device as a coupling, and that it was used for a gas container, violated the provisions of Sec. 4888 of the Revised Statutes (U.S.C., Title 35, Sec. 33), which provides that the inventor

> "shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery."
>
> *Minerals Separation* v. *Butte & Superior Mining Co.*, 250 U. S. 336, 39 S. Ct. 496.

This Court in interpreting that statute cited from its earlier decision in *Keystone Bridge Co.* v. *Phoenix*, 95 U. S. 274:

> "But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office. • • • As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

Wherefore, your petitioner prays for a writ of certiorari to be issued under the seal of this Court directed to the United States Court of Appeals for the Third Circuit; that the judgment of the Court of Appeals be reversed and set aside, and final judgment be entered for petitioner with its costs; and that the petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

RANDOLPH LABORATORIES, INC.,
By Ralph M. Snyder,
Attorney for Petitioner.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court for the District of New Jersey is reported at 82 F. Supp. 316, and the opinion of the Court of Appeals for the Third Circuit is reported at 178 F. (2d) 477.

Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the judicial code. The judgment of the Court of Appeals was entered December 21, 1949 (R. 113).

Statement of the Case.

The pertinent facts are briefly stated in the foregoing petition and are supplemented in the argument which follows.

Specification of Errors.

1. The courts below erred in failing to apply the doctrine of unclean hands because of respondent's improper use of patents to build up a monopoly in the carbon dioxide fire fighting equipment field, and its illegal, restrictive covenants and licenses, particularly with respect to price to be charged the ultimate consumer.

2. The courts below erred in entering a judgment holding the Mapes Reissue patent No. 18,839 valid and infringed and in holding said patent infringed by any of petitioner's products.

ARGUMENT.

Respondent's Unclean Hands due to illegal extension of its patents.

Respondent, owner of the four patents in suit (three of which were held invalid by both courts below), filed a large number of suits for infringement, none of which was ever adjudicated on the merits until petitioner brought this declaratory judgment suit.

Instead respondent used its suits as a cudgel to coerce the entire industry into accepting licenses under one or more of the patents (Randolph Exhibit 11), so that counsel for respondent could state in its brief before the Court of Appeals, "The entire industry was licensed under it during its life."

Respondent's President Carson specifically admitted that the licenses contained price-fixing clauses and that price schedules to its licensees had been issued by respondent or its predecessor, Walter Kidde & Company. Mr. Carson identified the license tendered petitioner as Plaintiff's Exhibit 13, and testified that similar license agreements were issued to CO_2 Fire Equipment Co., American-LaFrance-Foamite Corporation, National Foam System, Inc., Fyr-Fyter Company, General Detroit Corporation, General Pacific Corporation, Buffalo Fire Appliance Company, and Walter Kidde & Company. Carson testified categorically that these licenses contained price-fixing clauses and that price schedules to its licensees had been issued (R. 65).

The illegal, restrictive covenants are set forth in paragraph 7 of the license agreement which is reproduced at R. 74. It provides that licensor shall have the right to

require its licensees not to sell directly or indirectly any apparatus embodying features covered by the patents at—

> "prices less than, or upon terms contrary to those which Licensor will set forth in a Schedule or Schedules of Minimum Prices and Terms to accompany such notice."

Section d of paragraph 8 provides that for violation of this arrangement the licensee shall pay to the licensor as liquidated damages—

> "an amount equal to sixty-five per cent (65%) of the price of the apparatus so sold, or otherwise disposed of, computed on the prices set forth in such Schedule of Minimum Prices and Terms."

In an attempt to avoid the law respondent enjoined licensees from selling to jobbers and insisted upon section j, which provides:

> "Neither party will dispose of apparatus covered by this license otherwise than directly to the ultimate consumer or to the classes of customers mentioned in any such Schedule of Minimum Prices and Terms."

Respondent by preventing sales to intermediate parties thus tried to avoid the long line of decisions of this Court forbidding such restrictive covenants, including

Standard Sanitary Mfg. Co. v. *United States,* 226 U. S. 20, 33 S. Ct. 9

Standard Oil Co. v. *United States,* 283 U. S. 163, 174

Ethyl Gasoline Corp. v. *United States,* 309 U. S. 436, 60 S. Ct. 618

This subterfuge of selling only to ultimate consumers and therefore not transferring title until the product reached the ultimate consumer was exposed and con-

demned by this Court in *United States* v. *Masonite Corporation*, 316 U. S. 265, 62 S. Ct. 1070, where it was held that where a monopoly existed by reason of such extra territorial acts beyond the scope of the patent protection, the restrictions were illegal. To permit such acts as respondent has indulged in, said this Court in the *Masonite* case—

> "would allow the patent owner under the guise of his patent monopoly not merely to secure a reward for his invention but to secure protection from competition which the patent law unaided by restrictive agreements does not afford." (P. 279)

Where the patent owner assumes to fix prices at which competitors may sell—

> "the device is without more an enlargement of the limited patent privilege and a violation of the Sherman Act. In such a case the patentee exhausts his limited privilege when he disposes of the product to the *del credere* agent." (p. 279)

In *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, it was held that such practices as are involved here do not escape the provisions of the *General Electric* case, 276 U. S. 476, where a patentee is seeking in concert with other members of the industry to fix prices. Where counsel argued that the entire industry paid tribute to the patents in suit, it is significant that the tribute was not to the patents but was a part of the purpose of the monopolists of maintaining prices through a fixed price schedule and eliminating jobbers, which was condemned in the *Gypsum* case.

The Mapes Reissue Patent Is Invalid for Want of Invention.

Although the Mapes patent claims the anti-recoil device *per se, the* patentee Mapes was compelled to admit that the earlier Campbell patent showed such an anti-recoil device (R. 9). Thereupon the patentee fell back upon the claim that he had so placed the anti-recoil device that a connection could be made with the extinguisher without removing the recoil cap (R. 10). So placing the anti-recoil device that it need not be removed when the extinguisher is discharged or recharged was not new. The patentee himself admitted:

> "A competing company, the Fire Freeze Company, which we later bought out, had an extinguisher in 1926 and '27 which had a device on it to prevent recoil. They had given this matter some study, as we had, and they provided a moving check in the outlet, a little ball that when the hose was detached, checked and the gas couldn't come out, so there was no recoil; but when the hose was screwed on, the check was displaced back to leave a passage through which the gas could go." (R. 8)

All that Mapes did was to employ the form of old anti-recoil device shown by Campbell twenty years earlier, and insert it just as the Fire Freeze Company inserted its anti-recoil device within the outlet so that it need not be removed. Petitioner's expert witness Yeomans classified the structure of the Campbell patent, that of the Fire Freeze and the structure disclosed and claimed in Mapes as substantially the same structures (R. 16).

So obvious was the narrow scope of the Mapes Reissue patent that counsel early in the trial disclaimed any pioneer characteristics and stated:

> "• • • it did not create an industry nor may it be considered a basic patent since there are a number of companies that do not use it." (R. 5).

An Application of A Known Principle to A Known Problem By a Modification of A Device Already Known Does Not Amount to Invention.

In *Hollister* v. *Benedict & Burnham Mfg. Co.*, 113 U. S. 59, 5 S. Ct. 717, this Court held the Locke patent invalid for want of invention, for the same reasons that are applicable here. There, as in the instant case, the elements were old, and the idea of moving one element to accomplish the same purpose accomplished by the previous Fire Freeze device did not amount to invention. The Court there said (p. 724):

> "As soon as the mischief became apparent, and the remedy was seriously and systematically studied by those competent to deal with the subject, the present regulation was promptly suggested and adopted; just as a skilled mechanic, witnessing the performance of a machine, inadequate by reason of some defect, to accomplish the object for which it had been designed, by the application of his common knowledge and experience perceives the reason of the failure and supplies what is obviously wanting. It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the constitution and the patent laws to encourage and reward. On this ground the decree of the circuit court is reversed, and the cause remanded, with directions to enter a decree dismissing the bill; and it is so ordered."

In *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 62 S. Ct. 37, this Court held the Mead patent for a cigar lighter used in automobiles void for lack of patentable invention. The patentee had added a thermo-

static control responsive to the temperature of the heating coil. The Supreme Court pointed out that thermostatic controls of a heating unit were well known in the art. As against patentee's contention that the new combination had an entirely different mode of operation, the Court said (p. 90):

> "We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute, 35 U.S.C., Sec. 31, 35 U.S.C.A. Sec. 31, R.S. Sec. 4886, the device must not only be 'new and useful', it must also be an 'invention' or 'discovery'."

This Court further said (p. 90):

> "Since *Hotchkiss* v. *Greenwood,* 11 How. 248, 267, 13 L. Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art."

On page 91 the Court concludes:

> "He merely incorporated the well-known thermostat into the old 'wireless' lighter to produce a more efficient, useful and convenient article. * * * A new application of an old device may not be patented if the 'result claimed as new is the same in character as the original result.' (*Blake* v. *San Francisco,* 113 U. S. 679, 683) even though the new result had not before been contemplated. *Pennsylvania R. R. Co.* v. *Locomotive Engine Safety Truck Co.,* 110 U. S. 490, 494."

While the Court found that ingenuity was required to effect the adaptation it stated that no more was required than was to be expected of a mechanic skilled in the art. The progress of the sciences and arts is not promoted by recognizing such a degree of skill for the reason as pointed out by this Court at (p. 92):

> "Strict application of that test is necessary lest in the constant demand for new appliances the heavy hand of tribute be laid on each slight technological advance in an art. The consequences of the alternative course were forcefully pointed out by Mr. Justice Bradley in *Atlantic Works* v. *Brady*, 107 U. S. 192, 17 Otto 192, 200, 2 S. Ct. 225, 231, 27 L. Ed. 438: 'Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the art. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.'"

Likewise, the Court of Appeals for the Seventh Circuit in *Sales Affiliates, Inc.* v. *National Mineral Co.*, 172 F. (2d) 608, reversed the trial court and held the Winkel patent and the Evans and McDonough patent for hair treating pads invalid. In that case the patentee had changed the housing element from the outside to the inside of the body. The court concluded that this change and making the pad more easily handled is not invention but is merely the product of skill in the art.

The Court of Appeals for the First Circuit in *Loew's Drive-In Theatres, Inc.* v. *Park-In Theatres, Inc.*, 174 F. (2d) 547, reversed the trial court and held the Hollingshead drive-in theater patent invalid for want of invention. This case emphasizes the fact, which is applicable here, that the means by which the result is accomplished must amount to patentable invention and not the idea. The court there said (p. 551):

"For it is elementary that however new and useful, or even revolutionary and beneficial to humanity, an idea may be, it is not of itself patentable. The principle was succinctly stated years ago by the Supreme Court in *Rubber-Tip Pencil Company* v. *Howard,* 20 Wall. 498, 507, wherein it is said: 'An idea of itself is not patentable, but a new device by which it may be made practically useful is,' and a few years later it was reaffirmed in *Miller* v. *Eagle Manufacturing Co.,* 151 U. S. 186, 201, by the statement: 'It is not the result, effect, or purpose to be accomplished which constitutes invention, or entitles a party to a patent, but the mechanical means or instrumentalities by which the object sought is to be attained.' See also *Knapp* v. *Morss,* 150 U. S. 221, 227, 228; Walker on Patents (Deller's Ed.) Sec. 21."

The District Court had made a finding that the drive-in theater was ingenious, practical and a good business investment and a beneficial contribution to the art of exhibition of moving pictures. As to this the court said (p. 552):

"For we are not here called upon to deal with the novelty, usefulness or commercial success of the out-door drive-in theatre as an idea, or as a system for transacting business, but with the 'mechanical means or instrumentalities' (*Miller* v. *Eagle Manufacturing Co., supra*) 'by which it [the idea or system] may be made practically useful' (*Rubber-Tip Pencil Company* v. *Howard, supra*) to which means we now turn our attention."

Concluding the court said (p. 553):

"Viewing the opinion, findings and conclusions of the court below as a whole it seems evident that that court was so impressed with the novelty, usefulness, and commercial success of out-door drive-in theatres that it failed to focus its attention sharply upon the means employed to make such theatres practically useful. In view of our own analysis of Hollings-

head's means we are of the opinion that the ultimate finding of the court below that an exercise of the faculty of invention was required to devise those means was clearly erroneous." citing *Graver Tank* v. *Linde Products Co.*, 336 U. S. 271, 69 S. Ct. 535.

The Statutes Require That the Patentee Shall "Particularly Point Out and Distinctly Claim * * * the Improvement * * * Which He Claims As His Invention or Discovery" and Every Element Claimed Is Deemed to Be Material.

This Court in *Minerals Separation, Ltd.* v. *Butte & Superior Mining Co.*, 250 U. S. 336, 39 S. Ct. 496, specifically so stated at page 347. The opinion also refers to the earlier decision of the Supreme Court in *Keystone Bridge Co.* v. *Phoenix*, 95 U. S. 274, 278, wherein the Court stated:

> "But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office. * * * As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

The Courts below in finding infringement ignored the limiting elements of the claims. In view of the fact that the Randolph safety cap cannot be considered to be or function as a coupling, claim 6 cannot be infringed. Neither does Randolph use "a body member externally threaded adjacent each end" as is called for in claims 8 and 9. As a matter of fact, plaintiff's witness Yeomans testified that he had watched the way Randolph Laboratories recharged their fire extinguishers and observed that in recharging them they removed the safety cap

because the liquid could be introduced into the cylinder in about one-third of the time with the safety cap removed (R. 14, 15). This testimony was not challenged, contradicted or rebutted. The indefinite claim 16 as pointed out by plaintiff's witness Yeomans (R. 16) reads equally upon the earlier Campbell structure.

The Mapes patent in suit relates to gas cylinders. All of the objects are limited to gas cylinders, and claim 16 is expressly limited to a gas container. Petitioner's receptacles are not for gas containers, but all are for liquid carbon dioxide as is obvious from the insertion in every model of a siphon tube to siphon the liquid up to the discharge nozzle.

CONCLUSION.

This Court is respectfully requested, in the interest of uniformity of decisions and with the view to ending the uncertainty existing with respect to the penalty for going outside the legitimate protection of a patent to unlawfully build up a monopoly beyond its scope, to issue its writ of certiorari to review and supervise these proceedings on the grounds set forth in the petition and argued in this brief.

Respectfully submitted,

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Attorney for Petitioner,
Randolph Laboratories, Inc.

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Of Counsel.